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Attorneys for Petitioners.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1941

No. 312

WORTHINGTON AMES and GERTRUDE AMES (husband and wife),

Petitioners,

vs.

EMPIRE STAR MINES COMPANY, LTD. (a corporation),

Respondent.

PETITIONERS' REPLY BRIEF.

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Subject Index

	Page
The Issue	4
Facts of Location	5
Rights Created by Miners	8
Meaning of "Mineral Lands"	9
Cases Cited by Respondent (Br. 10) to Support Its Theory That Rights in Minerals in Railroad Lands Could Be Acquired up to Date of Patent Do Not Hold With Such Theory	10
Certificate of Entry	12
School Lands	12
Equities	13

Table of Authorities Cited

Cases	Pages
Barden v. N. P. R. R. Co., 154 U. S. 288	10
Belk v. Meagher, 104 U. S. 279	6
Burke v. S. P. R. R. Co., 234 U. S. 669	2, 9, 10
Cole v. Ralph, 252 U. S. 285	8
Deseret Salt Co. v. Tarpey, 142 U. S. 241	2, 10
East Central Eureka M. Co. v. Central Eureka M. Co., 204 U. S. 266	11
East Central Eureka M. Co. v. Central Eureka M. Co., 146 Cal. 147	11
Fuller, Geo. A., v. Otis Elevator Co., 245 U. S. 489	3
Lee Doon v. Tesh, 68 Cal. 43	4
Mining Co. v. Tunnel Co., 196 U. S. 337	6
Northern Pac. Ry. Co. v. North Dakota, 236 U. S. 585	4
Postal Telegraph Co. v. Newport, 247 U. S. 464	4, 8
Pralus v. Jefferson G. & S. M. Co., 34 Cal. 558	8
Southern Pac. Co. v. Schuyler, 227 U. S. 601	4, 8
West v. Standard Oil Co., 278 U. S. 200	2, 10, 11
Wisconsin v. Price, 133 U. S. 496	2, 10

Texts	
Lindley, Mines (3d), Sec. 41	4
Lindley, Mines (3d), Sec. 53	8
Lindley, Mines (3d), Secs. 216, 219	6
Lindley, Mines (3d), Sec. 272	7

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PETITIONERS' REPLY BRIEF.

In replying to respondent's brief, we wish to point out therein certain erroneous assumptions of fact, allusions to non-existent facts, and consequential misapplications of law.

Respondent offers six reasons for the denial of the petition herein. (Br. 1-2.) Our comments thereon are correspondingly numbered:

1. The decision of the California Supreme Court is not in conformity with state and federal decisions.

It is contrary to *Wisconsin v. Price,* 133 U. S. 496, and *Deseret Salt Co. v. Tarpey,* 142 U. S. 241, which are to the effect that a railroad grant is one *in praesenti,* taking effect as of the date of the act where the language of the act contains present words of grant. Nor is the decision in accord with the cases on the finality of a patent, or of the estate granted, particularly, *Burke v. S. P. R. R. Co.,* 234 U. S. 669; *West v. Standard Oil Co.,* 278 U. S. 200.

2. The decision does jeopardize railroad and state titles. Any decision which, contrary to established law, takes the property of one person and awards it to another jeopardizes titles. If the decision in question is correct, the holder of a railroad or agricultural patent never knows what his patent conveys. It would always remain a question of fact whether his patent conveyed the fee or surface rights only, dependent upon whether or not a mining claim had ever been located on or about it.

3. The fact that this matter received consideration by the District Court of Appeal, as well as the Supreme Court of the State of California, does not correct the error committed. The District Court of Appeal rendered its decision. Thereupon, the California Supreme Court granted a hearing. The California Supreme Court must have thought that the decision of the District Court of Appeal was not sound, at least it was not satisfied with it, otherwise the hearing would not have been granted. The California Supreme Court, in its decision, did not notice or comment on the decision of the District Court of Appeal.

The reasons upon which the two decisions are based are widely different (the decision of the District Court of Appeal is reported (93 Pac. (2d) 635)). Hence, there was not uniformity of view among the participating judges as to the law applicable to the case.

4. The decisions of any Court are entitled to their due weight and consideration, but this is no reason to follow an erroneous decision upsetting prior precedents of the United States Supreme Court and even prior decisions of the California Supreme Court itself.

5. Under its fifth reason, respondent states that our petition, brief and the dissenting opinion "contain many erroneous statements of both law and fact". If this is true, especially with reference to "erroneous statements of * * * fact", in all fairness, respondent should point out such erroneous statements. After making this charge, nowhere does respondent point out any erroneous statement of fact in either our petition, brief or the dissenting opinion. We believe the erroneous statements of fact are made by respondent as we shall hereinafter point out specifically.

6. By certiorari, the Supreme Court of the United States has the same power of review as if the case came before it on appeal.

Geo. A. Fuller v. Otis Elevator Co., 245 U. S. 489.

Where the question arises, if the basis of fact upon which the state Court rested its decision, denying

asserted federal rights, has any support in the record, it is the duty of the United States Supreme Court to review and correct the error.

Southern Pac. Co. v. Schuyler, 227 U. S. 601, 611;

Northern Pac. Ry. Co. v. North Dakota, 236 U. S. 585, 593;

Postal Telegraph Co. v. Newport, 247 U. S. 464, 473.

In the instant case, evidence incompetent was admitted and as admitted is insufficient to support the Court's findings.

THE ISSUE.

Under the heading "The True Issue", respondent states (Br. 5), that the real issue is "whether prior to June 14, 1880, title to the extralateral segment of the Pennsylvania vein had been acquired by respondent's predecessor so as to have been legally severed from the subsurface of the Ames tract and thus excepted from the patent to the railroad company".

This statement is merely a circumlocution. If the railroad company acquired a fee in the Ames land on July 25, 1866, and not merely surface rights, then it is clear that thereafter no one could acquire a right to mine in said land except from the owner thereof. If miners were trespassers on the public domain prior to July 26, 1866, as held by the authorities (Lindley, Mines (3d) Sec. 41, *Lee Doon v. Tesh,* 68 Cal. 43), and admitted by respondent (Br. 13),

such miners, prior to July 26, 1866, had not and could not acquire any rights in the public domain, and, hence, no rights in the Ames land. The California Supreme Court correctly treated the issue as one of priority of title, but erroneously decided it. The California Supreme Court said (R. 372):

> "The controversy turns upon the priority of title to the subsurface of the plaintiff's land."

The issue cannot be camouflaged; it is one of priority of title, and this priority is with petitioners' title. Petitioners' title is derived from a railroad grant made July 25, 1866, taking effect as of that date. Prior to that time, Congress had not authorized the disposal of mineral lands and, hence, prior to that time, miners had no right or title to such mineral lands.

FACTS OF LOCATION.

Respondent, seeking to avoid the issue of priority of title, omits and fails to meet our challenge that no proof of location, prior to 1866, was made of its claims. Under the heading "Restatement of Facts" (Br. 3), respondent says:

> "As early as 1863, both the Pennsylvania and Jefferson *locations* were in possession of and being worked by the then owners, etc."*

By what proof or authority may the Pennsylvania and Jefferson *possessions* in 1863 be spoken of as *loca-*

*All italics ours.

tions? When did they become *locations?* That is the question. Respondent's references to the record (Br. 3), in support of this statement *are references to evidence of possession only.* There is no reference to evidence of location, and the record contains no such evidence. The material fact bearing on the age of title of any mining claims is *location* and the date thereof. Possession without location is nothing, certainly not proof of location.

Belk v. Meagher, 104 U. S. 279, 284.

> "The right to the possession comes only from a valid location. Consequently, if there is no location there can be no possession under it. *Location does not necessarily follow from possession, but possession from location.* A location is not made by taking possession alone, but by working on the ground, recording and doing whatever else is required for that purpose by the act of Congress and the local laws and regulations."

Mining Co. v. Tunnel Co., 196 U. S. 337, 346:

> "*Location is the act or series of acts by which the right of exclusive possession* of mineral veins and the surface of mineral lands is vested in the locator. For this the only requirement made by Congress is the marking on the surface of the boundaries of the claim. By section 2324, however, Congress recognized the validity of any regulations made by the miners of any mining district not in conflict with the laws of the United States or the laws of the State or Territory within which the district is situated."

Lindley, Mines (3d), Sec. 216, 219.

Since respondent contends that its title goes back to locations made prior to 1863, such locations would

have to be under miners' rules and regulations. Where is the proof of what the rules and regulations were of Browns Valley Mining District? Judicial notice cannot be taken of such.

Lindley, Mines (3d), Sec. 272.

Where is the proof of what acts were done by way of location of the two mining claims in question? The record is silent. It contains no evidence of what the rules and regulations were of the Browns Valley Mining District, nor any evidence of any acts done by way of location. We do not contend that no location was ever made of respondent's Pennsylvania claim, but we do dispute the contention that location was made prior to July 25, 1866. The fact that a patent was issued for this claim establishes the fact of location, but since the form of the claims follows the form prescribed by the Act of 1872, it must be presumed, in the absence of other proof of location, that location was made with this Act in mind, and, hence, subsequent to its enactment.

As to respondent's Jefferson claim, the earliest location to which title is attached is that of F. W. Johnson made June 4, 1891. (R. 260.)

Respondent's statement based on findings 12 and 13 of the trial Court (R. 15, 16) that (Br. 3-4): "The mine workings * * * had penetrated beneath the subsurface of the Ames tract at or prior to July 25, 1866", is without any evidence to support it and is not true. "Defendant's Exhibit F3" (R. 284) states, that in 1867 the Pennsylvania mine was down 600 feet. The workings at this depth reached but did not penetrate the Ames land. (R. 152.) The Court

is not bound by findings which have no evidence in support thereof.

Southern Pac. Co. v. Schuyler, 227 U. S. 601, 611;

Postal Telegraph Co. v. Newport, 247 U. S. 464, 473.

Therefore, even if we assume that respondent's predecessors could gain any title by location under miners' customs prior to July 26, 1866, it has failed to prove any such location.

Location is a definite series of acts required to be done by miners' customs or by law.

Cole v. Ralph, 252 U. S. 285;

Pralus v. Jefferson G. & S. M. Co., 34 Cal. 558, 562.

We pointed out in our brief in support of our petition that there is a lack of proof of location prior to 1866. Respondent has not and cannot point to such proof of location because the record contains none.

Respondent, nevertheless, proceeds throughout its brief ignoring the lack of proof of location as if this were an admitted fact.

The Act of July 26, 1866, was the first act of Congress authorizing the sale of mineral lands, notwithstanding respondent's assertion to the contrary.

Lindley, Mines (3d), Sec. 53.

RIGHTS CREATED BY MINERS.

Respondent (Br. 6) speaks of "*The right created by the miners* in the early 1850's to follow the vein

extralaterally", etc., as if the miners had the right to dispose of the public domain. Respondent argues that Congress confirmed this right, though admitting that, prior to the Act of Congress of 1866, such miners were trespassers on the public domain. If such miners were trespassers they had no rights to confirm. Congress may have recognized, *good only among miners,* such rights as miners may have created among themselves, but in no way affecting the title of the United States or grantees of the United States. But, again, we call attention to the fact that no proof exists as to miners' rules or compliance therewith. Therefore, what the miners may have done generally "in the early 1850's", is purely academic in the case at bar.

MEANING OF "MINERAL LANDS".

We have no dispute with what respondent says (Br. 9-11) about the policy of Congress excluding "mineral lands" from grants to states and to railroads, but we do dispute the meaning applied to this term by respondent in the case at bar. Congress did not exclude *minerals in lands* apart from the lands themselves. Congress excluded only *mineral lands* for which other lands in lieu thereof could be granted. Congress did not exclude the subsurface of one parcel of land with the right to grant the subsurface of another parcel in lieu thereof. Congress did not attempt to define the term "mineral lands", but used it in its ordinary or popular signification.

Burke v. S. P. R. R. Co., 234 U. S. 669, 676.

CASES CITED BY RESPONDENT (Br. 10) TO SUPPORT ITS THEORY THAT RIGHTS IN MINERALS IN RAILROAD LANDS COULD BE ACQUIRED UP TO DATE OF PATENT DO NOT HOLD WITH SUCH THEORY.

Barden v. N. P. R. R. Co., 154 U. S. 288, is the case which lays down the rule that mineral lands within the place limits of railroad grants can be located up to date of patent. In the *Barden* case no patent had been issued, the finality of a patent was not involved. Nevertheless, the Court indicated (154 U. S. 228, 330-31) what its decision would have been if a patent had been involved. The question of finality of patent did arise and was answered in accordance with our contention in *Burke v. S. P. R. R. Co.,* 234 U. S. 669. If respondent's position is well taken, then every railroad or agricultural patent, or school land grant, must depend for finality upon a question of fact, viz., was a mining claim ever located on or about them. If so, such patent is subject to location and relocation again and again, and the owner of the patented land will never know until the end of time what his subsurface rights are, or what his patent conveyed. It certainly is not the policy of the law to have patented grants of the United States in such an unsettled condition.

Notwithstanding respondent's contention to the contrary, *Wisconsin v. Price,* 133 U. S. 496, and *Deseret Salt Co. v. Tarpey,* 142 U. S. 241, are apropos to the case at bar. The Ames land is a non-mineral tract, so determined by the issuance of patent, the patent relates back to the date of the grant and the estate granted is a fee. Also it is not true that *Burke v. S. P. R. R. Co.,* 234 U. S. 669, and *West v.*

Standard Oil Co., 278 U. S. 200, dealt only with surface conflicts. These cases dealt with the fee title in each instance just as fully as the fee is involved in the case at bar.

East Central Eureka M. Co. v. Central Eureka M. Co., 204 U. S. 266, does not militate against petitioners' contentions, but is in support thereof. In the *Eureka* case the title to the mining claim without question was granted first and subsequent thereto title to the agricultural land.

This case is reported in 146 Cal. 147, and at p. 151 the Court says:

> "The defendants own the adjoining land, known as the Toman Ranch, their title being derived through mesne conveyances from patents issued under the laws of the United States providing for the sale and disposition of agricultural lands, which patents were junior in point of time to the patent for the Summit Quartz Mine, and contained a reservation giving the right to the proprietor 'of a vein or ledge to extract and remove his ore therefrom should the same be found to penetrate or intersect the premises hereby granted'."

Respondent can get comfort out of this case only on the basis of an assumption of an unproved location under miners' rules and regulations prior to July 25, 1866, and by invoking a fallacious rule that Congress, after granting to the railroad company, could grant a second time to some one else, lands previously granted. The *East Central Eureka* case holds that when a grant has been made, it defeats

subsequent grants of the same land, the very thing petitioners contend for in the case at bar.

CERTIFICATE OF ENTRY.

Respondent asserts that the certificate of final entry issued for the Pennsylvania mine, May 31, 1880, was the "equivalent of patent". If this is so then we wish to point out that the railroad company had this "equivalent of patent" prior to May 31, 1880. The patent which covers the Ames land reads (R. 210):

> "Whereas certain tracts of land have been selected by Benjamin B. Redding, the Agent of the said 'Central Pacific Railroad Company', successor of the said 'California and Oregon Railroad Company' as shown by his original lists of selections, dated October 1 and 10 and Nov. 15, 1879, January 16, and April 22, 1880, and certified under dates of October 6 and 18, and November 21, 1879, January 20 and April 26, 1880, by the Registers and Receivers at Marysville and Shasta, California, and the President of the said Central Pacific Railroad Company has applied for a conveyance of the title to said lands granted by the aforesaid Acts of Congress to the said 'California and Oregon Railroad Company, its associates, successors and assigns'."

SCHOOL LANDS.

With reference to the school land title, respondent says (Br. 19), "Congress never intended that minerals

should pass under school land grants if the minerals were known to exist at the date of approval of the survey of the school section. The Pennsylvania was actively worked long prior to 1863." It is to be noted that respondent uses "minerals", instead of "mineral lands". It is the latter which is excluded in Congressional grants. Therefore, unless respondent has proved that its predecessors acquired from the United States title to the subsurface of the school lands prior to 1867, the state acquired the fee simple title on the date of the approval of the township and section survey, to-wit, August 6, 1867. (R. 115.)

EQUITIES.

When respondent comes to "The Equities", it has forgotten entirely that no evidence of location is in the record and states (Br. 22):

> (1) "The Pennsylvania and Jefferson claims were *located* and mined over 75 years ago."

This is a bold assertion, but with no evidence to support it.

> (2) "Workings on the dip of the vein had already extended beneath the surface of the Ames tract over 70 years ago."

This statement is simply not true. There is no proof or evidence to support it.

> (3) "This right to mine there had not been challenged during all these years until this suit was brought in 1937."

There is no evidence whatever in the record to support this statement.

> (4) "Petitioners have not contributed one cent to the development of this vein and yet seek to take this large investment from respondent after nearly three-quarters of a century has elapsed since these mining rights were initiated."

Does equity allow respondent or any one else to invade the property rights of another, merely because money has been spent to accomplish such invasion?

> (5) "They do so on the theory that away back in 1880 the non-mineral railroad patent took away from respondent's predecessor the property in the subsurface segment of the vein, and that such already known mineral rights became merged in the non-mineral patent to the surface."

This statement of petitioners' theory also is not true. We have stated our position very plainly many times, to-wit, Congress alone has power to dispose of rights in the public domain. On July 25, 1866, the Ames tract was *granted* to the railroad company. The grant was *in praesenti*. The grant made July 25, 1866, was confirmed by patent issued June 14, 1880. The patent was final and conclusive that the Ames tract was not within the mineral land exception of the granting act. The grant was of the fee and not merely of surface rights. Respondent's title to either of its claims could not antedate the first act of Congress, authorizing the disposal of mining land, to-wit, July 26, 1866. (14 Stat. 251.) Therefore, title to the Ames land having been granted to the railroad

company, Congress could not thereafter grant rights therein to some one else.

Therefore, petitioners respectfully submit that their petition is well taken and that certiorari should be granted as prayed.

Dated, San Francisco, California,
September 24, 1941.

Respectfully submitted,
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